

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
STACEY CHERNY, an individual, on his own :
behalf and on behalf of all similarly situated, :

Plaintiff, :

v. :

EMIGRANT BANK, a New York State :
Chartered Savings Bank, and :
DOES 1 to 100, persons unknown, :

Defendants. :
-----X

08 CV 5359 (VM)

**DECLARATION OF GORDON SCHNELL
IN SUPPORT OF MOTION
BY EMIGRANT BANK
TO DISMISS THE COMPLAINT**

I, Gordon Schnell, hereby declare pursuant to 28 U.S.C. § 1746:

1. I am a partner of Constantine Cannon LLP, counsel for Emigrant Bank ("Emigrant") in the above-captioned matter. I am an attorney in good standing, admitted to practice in the State of New York and in the United States District Court for the Southern District of New York.

2. I submit this Declaration based on my personal knowledge in support of Emigrant's Motion to Dismiss the Complaint.

3. Attached hereto as Exhibit A is a true and correct copy of the EmigrantDirect Internet Banking Agreement.

4. Attached hereto as Exhibit B is a true and correct copy of Emigrant's Consumer Privacy Policy.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 31, 2008
New York, New York



Gordon Schnell

EXHIBIT A



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Internet Banking Agreement

EmigrantDirect Internet Banking Agreement

What You Can Do To Protect Your Account

- Do not share your Password with anyone.
- Do not store your Password in a conspicuous place.
- Exit from your EmigrantDirect service when you are finished using it.
- Do not walk away from your computer while logged on to EmigrantDirect.
- Use anti-virus software to keep your PC clean and free of viruses.
- Review and reconcile your account activity on a regular, timely basis.
- Clear your browser's cache on a regular basis in order to remove copies of Web pages that may be stored temporarily on your system. See your browser HELP area for information on how to clear your cache.

Your User ID and Password

Prior to using EmigrantDirect, you will be prompted for your User ID and Password to access the service. You authorize us to follow any instructions entered through EmigrantDirect using your Password. Because your Password is used to access money and information about your accounts, you should treat your Password with the same degree of care and secrecy that you use to protect your ATM card PIN or other sensitive personal financial data. You should choose a User ID and a Password that you can remember easily since your access to the data using EmigrantDirect would be interrupted if you forget either of them. You agree not to give your Password, or make it available, to any person not authorized to access each of your Accounts. If you forget your Password, the online system will help you select a new one. However, an excessive number of attempts to log on using the wrong Password or User ID will result in your being locked out. You must call us at 1-800-836-1997 to obtain a new password, and your e-mail address must be up to date.

EmigrantDirect Functions - Balance Inquiries and Transfers

You may use EmigrantDirect to check the balance of your accounts and to transfer funds among your linked accounts. According to Federal Regulations, you may not make more than six (6) pre-authorized or automatic transfers from your savings account during any monthly statement period. The balance shown online may include deposits still subject to verification by us. The balance shown may also differ from your records because it may not include deposits in progress, or other withdrawals, or charges. If there are insufficient funds in an account from which you are requesting a funds transfer, the transfer will not be completed and you will be notified. A confirmation of your online transaction can be printed out for your records. Transfers to and from your external funding account (External Transfers) are processed via the Automated Clearing House (ACH). The cutoff time for transmitting External Transfers is 5:00 PM ET. External Transfers set up prior to the cutoff time will be processed on the next business day. External Transfers set up after the cutoff time or on a Saturday, Sunday or legal holiday will be processed on the following business day.

Electronic Messaging

EmigrantDirect provides you with the ability to send and receive electronic messages to and from us. Within the EmigrantDirect program, e-mail is secure. Please remember that we may not immediately receive an electronic message sent by you. No action will be made on any electronic message you send us until we actually receive your message and have a reasonable opportunity to act on it. You cannot use electronic messaging to originate an account inquiry or funds transfer.

Statements

Your monthly statements, which include all of your transactions, are displayed in an electronic format. Statements are maintained for 24 months. Only accounts with a balance of \$1,000 or more at the time of statement generation can select to receive the statement by postal mail.

Our Liability for Failure to Complete Transactions

We will process and complete all transfers properly initiated through EmigrantDirect in accordance with the terms of this Agreement. However, we will not be liable for, among other things:

- If, through no fault of ours, you do not have enough available funds in your account to make the transfer.
- If the funds are subject to legal process or other encumbrance restricting the transfer.
- If EmigrantDirect is not working properly and you knew, or had reason to question the possibility of the malfunction when you started the transfer.

- If your PC system, its modem and/or related operating systems and software are not working properly, including, without limitation, problems caused by the presence of a computer virus, and such failure to work properly is the substantial cause of the failure to complete the transfer under the terms of this Agreement.
- If your ISP is not working properly, including without limitation, problems caused by the presence of a computer virus and such failure to work properly is the substantial cause of the failure to complete the transfer under the terms of this Agreement.
- If circumstances beyond our control (such as fire, flood, delay in the U.S. Mail, or power failure or system failure) prevent the proper completion of the transaction despite reasonable precautions by us to avoid the circumstances.
- If there is any loss, damage or injury resulting from (i) an interruption in your electrical power or telephone service (ii) the disconnecting of your telephone line by your local telephone company or from deficiencies in your line quality; or (iii) any defect or malfunction of your PC, modem or telephone line. We are not responsible for any EmigrantDirect transactions other than those specified in the Agreement.
- If you are trying to defraud us.
- If we are otherwise exempted from liability under Applicable Laws and Regulations.
- The above are just some examples as to where we would not be liable and is not intended to list all such circumstances. However, in no event will our liability for failure to complete a transfer exceed the amount of the transfer.

Other Liabilities

Except as otherwise provided in this Agreement or by law, EmigrantDirect will not be liable for any loss, injury, or damage, whether direct, indirect, special, or consequential, caused by EmigrantDirect or the use thereof or arising in any way out of the installation, use or maintenance of software, including without limitation, loss or damages caused by the presence of a computer virus.

Business Days/Hours of Operation

EmigrantDirect is available seven days a week, for scheduling, modification, or review of transactions and balance inquiries except during regularly scheduled daily maintenance periods and from time to time as necessary. If we are performing maintenance, you will be able to view your balances which will be as of the close of business on the prior day and set up transfers. Any transfers you set up during this time will be completed in accordance with our next regularly scheduled processing time.

Notice of Your Rights and Liabilities

If you permit others to use EmigrantDirect or your password, you are responsible for any transactions they authorized relating to your accounts. Tell us AT ONCE if you believe that your password has been lost or stolen. Otherwise, you could lose all of the money in your accounts accessed by the password plus your maximum overdraft line of credit, if applicable. **Telephone us immediately if you believe your password has been lost or stolen or that someone has transferred or may transfer money from your account without your permission, at:**

1-800-836-1997

or write to:

EmigrantDirect
13 Croton Avenue
Ossining, NY 10562

If you tell us within two (2) business days after you discover that your password has been lost or stolen, you can lose no more than \$50.00, if someone used your Password without your permission. If you do not tell us within two (2) business days after you learn of the loss or theft of your Password, and we can prove we could have stopped someone from using your Password without your permission if you had told us, you could lose as much as \$500.00. Also, if your statement shows transfers that you did not make or authorize, tell us at once. If you do not tell us within 60 days after your statement date, you may not get back any money you lost after the 60 days if we can prove that we could have stopped someone from taking the money if you had told us in time. If a good reason (such as a long trip or hospital stay) prevented you from telling us, we can at our discretion extend the aforementioned time periods.

Errors and Questions

In case of errors or questions about your electronic transfers listed on your statement or appearing on the Account Activity screen of EmigrantDirect, you should do one of the following, as soon as possible:

Telephone EmigrantDirect Customer Service at

1-800-836-1997

or write to

EmigrantDirect
13 Croton Avenue
Ossining, NY 10562

or initiate an Inquiry using the online messaging available in your EmigrantDirect service.

We must hear from you no later than sixty (60) days after you receive the FIRST statement on which the problem or error appears. Tell us your name and account number. Describe the error or the transfer you are unsure about, and explain as clearly as you can why you believe it is an error or why you need more information. Tell us the dollar amount of the suspected error. In accordance with Federal Regulations, we will tell you the results of our investigation within ten (10) business days after we hear from you and will correct any error promptly. If we need more time, however, we may take up to forty-five (45) days to investigate your complaint or question. If we decide to do this, we will provisionally re-credit your account within ten (10) business days for the amount you think is in error, so that you will have the use of the money during the time it takes us to complete our investigation. If we ask you to put your complaint or question in writing and do not receive it within ten (10) business days, we may not re-credit your account. If we decide there was no error, we will send you a written explanation within three (3) business days after we finish our investigation (either by U.S. Mail or the online messaging system available in your EmigrantDirect service). You may ask for copies of documents that we used in our investigation.

Disclosures of Account Information to Third Parties

We will disclose information to third parties about your Accounts or the transactions you make as follows:

Where it is necessary for completing a transaction; in order to verify the existence and condition of your account for a third party, such as a credit bureau or payee; in order to comply with a governmental agency or court order; if you give us permission, which we may require in writing; in order to collect information for our internal use, the use of our service providers, and our servicing agents and contractors concerning our electronic fund transfer service; if it involves a claim by or against us concerning a deposit to or withdrawal from your account, or where otherwise required or permitted under state or federal laws and regulations.

Authorization to Obtain Information

You agree that we may obtain and review your credit report from an authorized credit bureau.

Termination You may terminate your use of EmigrantDirect at any time by calling us at 1-800-836-1997 or by writing to EmigrantDirect, 13 Croton Avenue, Ossining, NY 10562. You may also send an electronic message to EmigrantDirect via your EmigrantDirect service or e-mail us at CustomerService@EmigrantDirect.com. Termination will not affect your liability or obligations under this Agreement for transactions we have processed on your behalf.

Additionally, we may close your account, in our sole discretion, with or without cause.

Inactive Accounts

If there have been no Account inquiries or transfers using the EmigrantDirect service for an extended period of time, your account may be considered inactive. An inactive account will be escheated to the respective state of your residence in accordance with Applicable Law and Regulations.

Entire Agreement

This Agreement is the complete and exclusive agreement between you and us related to EmigrantDirect and supplements any other agreement or disclosure related to your accounts including the Deposit Account Disclosures with respect to EmigrantDirect. In the event of a conflict between this Agreement and any other agreement or disclosures related to any of your accounts or any statement by our employees or agents, this Agreement shall control.

Waivers

No delay or omission by us in exercising any rights or remedies thereunder shall impair such right or remedy or be construed as a waiver of any such right or remedy. Any single or partial exercise of a right or remedy shall not preclude further exercise therefore or the exercise of any other right or remedy. No waiver shall be valid unless in writing signed by us.

Assignment

You may not assign this Agreement to any other party. We may assign this Agreement or delegate any or all of our rights and responsibilities under this Agreement to any third parties.

Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the State of New York. The account relationship established herein shall be governed by the law of the State of New York without regard to the conflicts of law provisions thereof. In establishing an account herein, the depositor agrees that the United States courts sitting in the State of New York shall have jurisdiction over it, and that the venue of any such action shall be the Southern district of New York. By opening this account, the depositor hereby waives any objection to such jurisdiction and venue.

Amendments

We may amend or change any of the material terms and conditions of this Agreement at any time upon at least thirty (30) days written notice to you prior to the effective date of any such change or amendment. If you do not agree to the change or amendment, you must notify us prior to the effective date of the change or amendment and cancel your access to EmigrantDirect. Notwithstanding the forgoing, we may amend or change the term(s) or condition(s) without prior notice to you if the change is immaterial or does not result in higher fees, more restrictive service use, or increased liability.

Fees

No monthly fees are charged for EmigrantDirect.

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For more information, please call 1-800-836-1997 or email us at CustomerService@EmigrantDirect.com.

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EXHIBIT B



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Consumer Privacy Policy

Emigrant's Commitment to Safeguarding Consumer Privacy

At Emigrant, we recognize that our relationship with you is based on trust, and the protection of your private financial information merits the highest priority. That's why we have taken stringent measures and established corporate-wide procedures that ensure the confidentiality of all of your confidential information, whether we have received it directly from you or from a third party.

This policy outlines those procedures, and will be provided to you each year as long as you maintain an ongoing relationship with us.

Our Business Practices

- We collect only the information we need in order to serve you and conduct our business.
- We treat all personal and financial information about you in a confidential manner. This information may be obtained directly from you, or may be collected from other sources, or may result from applications you process with us.
- We maintain physical, electronic and procedural safeguards to protect customer information. We utilize state-of-the art technology for this purpose and upgrade, when appropriate, to improve our privacy protection performance.
- We limit access to your personal and financial information to those of our employees, agents and service providers that are required to have access to it in order to meet your financial needs or conduct our business.
- All of our employees, agents and service providers are responsible for compliance with the policies and procedures we have established to safeguard your personal and financial information.
- Our employees are governed by Emigrant's Code of Conduct, which expressly requires the confidentiality of customer information, and our employees receive training in the importance of adhering to the procedures we've established to assure that confidentiality.
- Our data processing and electronic operations are performed in a secure technical environment that is accessed only by authorized personnel to transact legitimate business operations.
- We maintain electronic safeguards to protect customer privacy on our websites. This assures that when you conduct your business with us from your home or office, the privacy of your relationship and the information you furnish us online is protected.
- We carefully monitor our compliance with applicable laws and regulations and our internal security policies and procedures.

Information We Collect and Use

We collect and use various forms of information to open and service your banking, insurance, credit, securities brokerage or other accounts with us. We may also use this information to determine if other products or services might be of interest to you.

We collect and use nonpublic personal and financial information about you from the following sources:

- information we receive from you on applications or other forms;
- information about your transactions with us, our affiliates, or others; and
- information we receive from a consumer reporting agency.

Information we receive about you from third parties may include credit bureau reports from consumer reporting agencies, or verifications received from other companies, in connection with loan applications or other transactions you have requested.

Sharing Information Within The Emigrant Family

We may share all of the personal and financial information we collect, as described above, about our current and former customers with Emigrant's affiliate family of companies, each of which provides unique and valuable products and services. They include, but are not limited to, mortgage banking services (residential, small business, and mixed-use property lending), insurance agency services, and loan administration, and private banking services.

Together, the Emigrant Family of companies offers a wide range of banking, loan and other products. By sharing information about your transactions and accounts among our Emigrant Family members, we give you an opportunity to enjoy the integrated financial services available. This process improves your access to information about all of the account relationships you maintain, and makes it easier for you to conduct business with us.

We are permitted by law to share the above information with our Emigrant Family members, and you do not have a right to opt out of the disclosure of this information.

In addition, we may share with our Emigrant Family members other information that we collect about you, including information we obtain from:

- your loan application, such as your income or marital status;
- a consumer report, such as your credit score or credit history;
- a third party to verify representations made by you, such as your open lines of credit or property insurance; and
- a third party regarding their employment, credit or other relationship with you, such as a verification of your employment or credit history.

Sharing Information With Other Companies That Do Work For Us

We may share all of the personal and financial information we collect, as described above, about our customers or former customers, with companies that do work for us, including our Emigrant Family companies, as necessary to or in connection with:

- effecting, administering or enforcing a transaction that you have requested or authorized;
- servicing or processing a financial product or service that you have requested or authorized;
- maintaining or servicing your account with us;
- maintaining or servicing your account with another company as part of a private label credit card program or other extension of credit on behalf of that company; or
- a transaction that necessitates the sharing of such information when such sharing is permitted by law.

These companies may include check printing and processing companies, data processing companies, and other service providers. We may also disclose all of the personal and financial information we collect, as described above, concerning our current and former customers to financial service providers, such as insurance agents, and to companies that perform marketing services on our behalf or to other financial institutions with whom we have joint marketing agreements. Sharing information with these companies is permitted by law.

We may also disclose nonpublic personal information about you to nonaffiliated third parties as permitted by law, and you do not have a right to opt out of the disclosure of this information.

All of these companies act on our behalf, and are contractually obligated to use the information that we provide to them only to provide the services that we have contracted with them to perform. Each company is required to keep all such information strictly confidential, and is prohibited from making any of this information available to any other entity.

Disclosure In Other Circumstances

Furthermore, we may disclose nonpublic personal information about you to our affiliates outside the

Emigrant Family companies, and/or to other third parties including, but not limited to, financial service providers, such as mortgage bankers, securities broker-dealers, credit card companies and insurance agents. All of these companies are contractually obligated to use the information that we provide to them only to provide the services that we have contracted with them to perform. Each company is required to keep all such information strictly confidential.

We may disclose personal and financial information in other circumstances, but we do not disclose any personal and financial information about our customers or former customers to anyone, except as permitted by law. This may include information provided:

- with your consent or direction;
- to comply with federal, state or local laws or other legal requirements, or a subpoena, summons, or judicial process, or to federal, state or local authorities, to the extent authorized by applicable law and regulation, including the Right to Financial Privacy Act;
- to protect the confidentiality or security of records pertaining to you, or a service, product or transaction pertaining to you;
- to protect against fraud, unauthorized transactions, claims or other liability;
- to a fiduciary on your behalf, or to your attorney, accountant or auditor; or
- under other circumstances authorized by law or regulation.

The Emigrant Family

This Consumer Privacy Policy is provided on behalf of the Emigrant Family of companies that offer consumer-related financial services: Emigrant Bank (providing a full range of banking products); its retail banking affiliates: Emigrant Savings Bank - Bronx/Westchester, Emigrant Savings Bank - Brooklyn/Queens, Emigrant Savings Bank - Long Island, and Emigrant Savings Bank - Manhattan; Emigrant Mortgage Company, Inc. (offering residential mortgage loans), Emigrant Agency, Inc. doing business as Emigrant Financial Services (featuring insurance, annuity, and mutual fund products), EmigrantDirect (a division of Emigrant Bank, offering certain products and services via the Internet) New York Private Bank & Trust Company (a division of Emigrant Bank, offering private banking services), and BancoFortuna (a division of Emigrant Bank, offering certain banking products and services via the Internet in Spanish).

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For more information, please call 1-800-836-1997 or email us at CustomerService@EmigrantDirect.com.

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